'Not Reportable'

CASE NO.: A 277/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

REGISTRAR OF CO-OPERATIVES **Applicant**

and

AGRA CO-OPERATIVE LTD **Respondent**

***CORAM*:** **PARKER J**

Heard on: 2011 August 31

Delivered on: 2011 September 14

JUDGMENT

PARKER J: [1] In this matter, the applicant has brought an application on a Notice of Motion, moving the Court to hear the matter on urgent basis and grant orders in terms contained in prayers 1, 2, 3 and 4 of the Notice of Motion. The respondent has moved to reject the application.

[2] I proceed to consider prayer 1 of the relief sought. I did not hear Mr. Maasdorp, counsel for the respondent, to oppose that relief. In any case, I think the prayer should be granted otherwise the very purpose of bringing the application would be rendered nugatory if the matter is heard in the ordinary course.

[3] It is worth noting from the outset that the burden of this Court in these proceedings is to decide whether to stay the operation and execution of the order that the Court, *per* Muller J, granted on 29 July 2011 ('the 29 July 2011 order') pending the outcome of the applicant's application for rescission of that order in terms of Rule 44 (1) (a) of the Rules of the Court.

[4] To start with; Mr Chibwana, counsel for the applicant, does not tell the Court under what section of the High Court Act, 1990 (Act No. 16 of 1990) or the common law or the rule of the Rules of Court that this Court should determine the application; that is, the source of power of the Court to stay the operation and execution of the 29 July 2011 order, which is valid and , therefore, enforceable, on the basis that there is filed with the Court an application to rescind that order. Mr Chibwana's submission dwelt almost exclusively and entirely – I must say – on the interpretation and application of rule 44 (1) of the Rules, but that rule concerns 'Variation and Rescission of Orders' and that is not the burden of this Court in these proceedings, as appears clearly in the relief sought in the Notice of Motion.

[5] A party, particularly a party which is represented by counsel, must point out clearly to the Court in an application of this nature, which seeks on urgent basis to stay the operation and execution of a valid and enforceable order of the Court, the

rule of law the applicant relies on for the relief sought to enable the Court to interpret and apply such rule, and also the power – statutory or common law – which the Court is being asked to exercise in determining the application in order for the Court to decide whether, in truth, it has such power and also to determine the limits of such of its power. In this regard, it would seem the applicant seeks interim interdict as Mr Chibwana sets out in his submission the requirements of interim interdict, and submits that the applicant has a prima facie right in satisfaction of the 'prima facie' right requirement of the grant of interim interdict. With the greatest deference to Mr Chibwana, I do not find anything on the papers remotely resembling a right – prima facie or clear – worthy of protection – that the applicant has demonstrated exists in his favour. If anything at all, it is rather the respondent who has a right that needs protection by this Court, to wit, her right to enforcement of a valid order of this Court in pursuit of his basic human right under Article 12 (1) of the Namibian Constitution. For this reason alone, the application stands to be dismissed.

[6] Be that as it may, I am aware that apart from such grounds as the noting of appeal, there are miscellaneous grounds for staying execution (*Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa*, 5 edn: 1089-1090, and the cases there cited). For example, the Court may order stay of execution where all parties were not before the Court. But in the instant case, all parties were by their respective counsel before the Court when the 29 July 2011 order was made. Additionally, the papers filed of record and placed before Muller J showed unmistakably that the applicant (respondent then) filed notice to oppose the application instituted by the respondent (applicant then) which resulted in the granting of the 29 July 2011 order. But thereafter the applicant (respondent then), within 14 days of filing the notice to oppose, failed to deliver his or her answering

affidavit as required by rule 6 (5) (d) (ii) of the Rules, or notice of his or her intention to raise a question of law only as required by rule 6 (5) (d) (iii); and *a fortiori*, there was nothing placed before Muller J to explain why rule 6 (5) (d) (ii) or rule 6 (5) (d) (iii) was not complied with. That being the case, in my opinion, the Court, *per* Muller J, was entitled to grant the 29 July 2011 order; he had no good reason not to grant the order. In view of these circumstances, coupled with what I have said previously about the entitlement of the respondent to have its Constitutional right protected by the Court, it would be unjust, unfair and unjudicial for this Court to grant the relief sough in prayer 2 of the Notice of Motion, that is, to stay the operation and execution of the 29 July 2011 order. In this regard, the rearguard action taken by Mr Chibwana with reference to judicial case management under the Rules cannot rescue the applicant's doomed application. After the fourteen years' time limit had expired, there was no case for the Judge to manage. By his failure to act in terms of rule 6 (5) (d) (ii) or rule 6 (5) (d) (iii) and there being no explanation therefor filed with the Court, as aforesaid, the applicant had evinced a clear intention that he could not be bothered and the train of justice could proceed without him; and the train of justice did proceed. It is too late in the day for Mr Chibwana to talk about judicial case management.

[7] In the result, I make the following order:

(1) The applicant's failure to comply with the forms and service and time limits prescribed by the Rules of Court, as may be necessary, is condoned, and that the matter be heard on urgent basis.

(2) The application to stay the operation and execution of the order granted by the Court, *per* Muller J, on 29 July 2011, is dismissed with costs; such costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr T Chibwana

Instructed by: Government Attorney

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. R Maasdorp

Instructed by: Engling, Stritter & Partners